



TESTIMONY OF MICHAEL J. NORTON  
SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

Regarding House Bill 13-1131, The Prenatal Sex Nondiscrimination Act

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I am privileged to testify today regarding the Prenatal Sex Nondiscrimination Act, House Bill 13-1131.

Frederick Douglass, born a slave, became perhaps the most influential black spokesman for emancipation and citizenship of the antebellum era through his newspaper, *The North Star*, founded in 1847. On the masthead of the newspaper was emblazoned the motto: "Right is of no sex; truth is of no color, God is the Father of us all - and all are brethren."

Abortion is a national and, indeed, international tragedy for those who believe that life begins at conception and that each and every human being is created in the image of God and is intrinsically valuable from the moment life begins. More and more frequently we are seeing evidence that abortion, though legal, is neither safe nor rare, to paraphrase the words of former President Clinton. Abortion is extremely difficult for the mother, for the father, and results in the death of the unborn child. The world will be a better place when our laws do not recognize a right to an abortion at virtually any time after conception.

House Bill 13-1131 is a good start. It would prohibit abortion committed by reason of the gender of the preborn patient by making the performance of an abortion for sex selection purposes a Class 2 Felony.<sup>1</sup> The bill could be made better by including "race" to "gender" to the list of prohibited abortions.

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<sup>1</sup> A physician treating a pregnant mother has two patients, the maternal patient and the fetal patient and owes duties of care to each. L.B. MCCULLOUGH AND F.A. CHERVENAK, ETHICS IN Greenwood Corporate Plaza, Building No. 3  
7951 E. Maplewood Avenue, Suite 100  
Greenwood Village, CO 80111  
720-689-2410  
mjnorton@alliancedefendingfreedom.org

Gender is an immutable human genetic quality that exists at conception, like a myriad of characteristics that are woven together in the womb to create each unique member of the human species.<sup>2</sup> Federal and State laws prohibit discrimination on the basis of gender in housing, employment, education, lodging, commercial transactions and in a host of other contexts. Human life in the womb is recognized and protected by the laws of many, if not most, of the United States, against crimes of violence.<sup>3</sup>

The targeted victims of sex-selection abortions committed in the United States and worldwide are overwhelmingly female and disproportionately black. As early as twenty years ago, Harvard researcher Amartya Sen found that more than 100 million women were demographically missing from the world's population due to discriminatory practices and policies that in part reflected strong cultural preferences for male babies, so-called "son preference."<sup>4</sup> *The Economist* recently reported on that phenomenon, and particularly on the role that sex-selection abortion plays in son preference.<sup>5</sup> "It is no exaggeration to call this gendercide," *The Economist* declared. "[T]he cumulative consequence for societies of such individual actions is catastrophic."<sup>6</sup>

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OBSTETRICS AND GYNECOLOGY (Oxford University Press New York 1994); D.W. Bianchi, *et al.*, FETOLOGY: DIAGNOSIS AND MANAGEMENT OF THE FETAL PATIENT (McGraw Hill New York 2000).

<sup>2</sup> Sex is determined even before fertilization. If a spermatozoon containing an x chromosome fertilizes an egg, the embryo will become a female; if the spermatozoon contains a y chromosome, the embryo will become a male. "Race" is a description of certain physical characteristics that are genetically determined; as discretely genetic characters, race and ethnicity do not exist, as the Human Genome Project explains:

DNA studies do not indicate that separate classifiable subspecies (races) exist within modern humans. While different genes for physical traits such as skin and hair color can be identified between individuals, no consistent patterns of genes across the human genome exist to distinguish one race from another. There also is no genetic basis for divisions of human ethnicity.

The Human Genome Project, "Minorities, Race and Genomics," available at [http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/minorities.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/minorities.shtml).

<sup>3</sup> See, e.g., Unborn Victims of Violence Act of 2004 (PUBLIC LAW 108-212), at 18 U.S.C. 1841 and 22 U.S.C. § 919a (UNIFORM CODE OF MILITARY JUSTICE, Article 119a).

<sup>4</sup> Amartya Sen, "More Than 100 Million Women Are Missing," *The New York Review of Books*, Vol. 37, Number 20, Dec. 20, 1990, available at <http://www.nybooks.com/articles/3408>.

<sup>5</sup> "Gendercide: The War on Baby Girls," *The Economist*, Mar. 4, 2010, available at <http://www.economist.com/node/15606229>.

<sup>6</sup> *Id.*

In 2007, the U.S. delegation to the United Nations Commission on the Status of Women advocated for a resolution condemning sex-selection abortion.<sup>7</sup> The U.S. Congress has passed multiple resolutions condemning the People's Republic of China for its failure to end sex-selection abortion.<sup>8</sup> The American College of Obstetricians and Gynecologists has likewise condemned the practice, stating, "[T]he committee opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices."<sup>9</sup>

The United States is far from immune to this problem. In 2008, researchers Douglas Almond and Lena Edlund of Columbia University analyzed year-2000 census data to document male-biased sex ratios among U.S.-born children of certain Asian and South Asian populations.<sup>10</sup> These researchers concluded that the demonstrated deviation from the norm in favor of sons was "evidence of sex selection, most likely at the prenatal stage."<sup>11</sup> This "Son Preference" was true regardless of the absence in the United States of many factors used to rationalize son bias in other countries (*e.g.*, high dowry payments, patrilocal marriage patterns, and China's one-child policy) and was irrespective of the mother's citizenship status. Almond and Edlund further observed, "Since 2005, sexing through a blood test as early as 5 weeks after conception has been marketed directly to consumers in the United States, raising the prospect of sex selection [abortions] becoming more widely practiced in the near future."<sup>12</sup>

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<sup>7</sup> *Draft Agreed Conclusions on the Elimination of All forms of Discrimination and Violence Against the Girl Child*, Commission on the Status of Women, 51st Session (26 February - 9 March 2007); *see also* Janice Shaw Crouse, "United States Resolution Shanghaied by China and India," *Concerned Women for America*, at <http://www.cwfa.org/articledisplay.asp?id=12532&department=BLI&categoryid=reports&subcategoryid=bliun>. Crouse noted that United Nations documents condemn the practice of sex-selection abortion; the United Nations Development Fund for Women (UNIFEM) argues that violence against women begins "quite literally" in the womb, and other U.N. documents label sex selection abortions as "violence." *Id.*

<sup>8</sup> H. R. CON. RES. 83, 109th Cong. (2005); H. R. RES. 794, 109th Cong. (2006).

<sup>9</sup> American College of Obstetricians and Gynecologists, Committee on Ethics, Committee Opinion 2007, available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co360.ashx?dmc=1&ts=20111203T1536377176>.

<sup>10</sup> D. Almond and L. Edlund, "Son-biased Sex Ratios in the 2000 United States Census," Jan. 24, 2008, available at [www.pnas.org/cgi/doi/10.1073/pnas.0800703105](http://www.pnas.org/cgi/doi/10.1073/pnas.0800703105).

<sup>11</sup> *Id.*

<sup>12</sup> For media reports on sex-selection advertisements, *see* Susan Sachs, "Clinics' Pitch to Indian Émigrés: It's a Boy," *The New York Times*, Aug. 15, 2001, available at <http://www.geneticsandsociety.org/article.php?id=118>; Rich Lowry, "The Backwardness of Abortion," *National Review*, Aug. 23, 2001, available at <http://old.nationalreview.com/lowry/lowry082301.shtml>.

This bill would make the commitment of an abortion for the purposes of sex selection a Class 2 Felony. The General Assembly may also wish to consider providing for civil remedies in the form of injunctive relief which may be sought by the Attorney General in a civil action and a private cause of action for the father of the baby lost to a sex selection abortion or, in the case of an unemancipated minor, the maternal grandparents of the preborn child.

It is our view that the U.S. Supreme Court's abortion jurisprudence supports this legislation should the General Assembly enact it. Although the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>13</sup> recognized the essential holding of the Court in *Roe v. Wade*<sup>14</sup> that women possess the right to obtain an abortion without undue interference from the State before viability, that holding, *Casey* clarified, was based on the Court's perception that the State's interests were not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure at that stage.<sup>15</sup> However, the Supreme Court has made it clear that States have a compelling interest in eliminating discrimination against women and minorities.<sup>16</sup> Moreover, the *Casey* Court also affirmed the principle that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the [unborn child]...."<sup>17</sup>

Nor can it be objected that no exception is made in House Bill 13-1131 for "medical necessity" or "health of the mother." By definition, abortions conducted because of the sex or race of the infant are elective procedures that do not implicate the health of the maternal patient. Consequently, the absence of a "medical necessity" or "health exception" in this bill is not a constitutional infirmity.<sup>18</sup>

The balance of House Bill 13-1131's provisions are likewise well-grounded in constitutional law and jurisprudence. The term "based on [sex]" used by House Bill 13-1131 is similar to the term "on the grounds of" employed by Title VI, 42 U.S.C. § 2000d. Both of these terms are functionally identical to the well-known and judicially developed

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<sup>13</sup> 505 U.S. 833 (1992).

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> *Casey*, 505 U.S. at 846.

<sup>16</sup> See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("There is a 'significant state interest in eradicating the effects of past racial discrimination.'"), quoting *Shaw v. Reno*, 509 U.S. 630, 656 (1993).

<sup>17</sup> 505 U.S. at 846.

<sup>18</sup> The Supreme Court approved the constitutionality of the federal Partial-Birth Abortion Ban Act despite the absence of a health exception in that statute, based upon the existence of a "documented medical disagreement" whether such an exception was required. *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007). In this case, although some authorities contend there is a basis for prenatal sex screening for the purpose of genetic counseling for certain diseases that are gender-determinant, there can be no substantial disagreement that such cases do not implicate the health of the maternal patient.

term employed by Title VII of the 1964 Civil Rights Act, "because of... [*inter alia*] [sex]."<sup>19</sup>

House Bill 13-1131 is conceived and drafted pursuant to sound constitutional authority and in the best tradition of this State's commitment to civil rights and equality for all of its citizens. Thank you again for the privilege of appearing before this Honorable Committee.

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<sup>19</sup> See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (affirming that the Title VII rubric "because of sex" is a workable standard that may be applied in a variety of contexts).

## APPENDIX 1 – RACIAL SELECTION ABORTION

In the case of racial selection abortion, it is no exaggeration to say that the African-American population of the United States has been decimated by the widespread availability of abortion on demand in the last forty years, and particularly by the placement of abortion providers disproportionately in high minority population centers. Nationally, for all racial groups, the abortion ratio<sup>20</sup> was 231 abortions for every 1,000 live births.<sup>21</sup> Among women from the 37 health agencies that reported results for race in 2007, “Black women had higher abortion rates and ratios than white women and women of other races.”<sup>22</sup> In the 25 reporting areas that reported cross-classified race and ethnicity data for 2007, “non-Hispanic black women had the highest abortion rates (32.1 abortions per 1,000 women aged 15 – 44 years) and ratios (480 abortions per 1,000 live births).”<sup>23</sup> Non-Hispanic black women accounted for nearly as many abortions proportionately as non-Hispanic white women (34.4% for black women vs. 37.1% for whites).<sup>24</sup> In 15 out of 38 reporting areas for which the data was available, the percentage of African-American abortions was approximately forty percent or higher, ranging up to 59.1% in one area (Georgia).<sup>25</sup>

Thus, although African-Americans account for only 13.6% of the U.S. population,<sup>26</sup> they account for over one-third of all abortions nationally, and in many states, that percentage is much higher. Commenting on this trend, the *Washington Post* observed that in the past 30 years, more mothers of color are opting to abort, and that in 2004, there were 10.5 abortions per 1,000 white women, compared with 50 per 1,000 black women.<sup>27</sup> In other words, African-American infants were more than five times

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<sup>20</sup> “Abortion ratios reflect the relative number of pregnancies in a population that end in abortion compared with live birth; abortion ratios change both according to the proportion of pregnancies in a population that are unintended and the proportion of unintended pregnancies that are continued.” Centers for Disease Control Abortion Incidence Report 2007, available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s\\_cid=ss6001a1\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s_cid=ss6001a1_w).

<sup>21</sup> *Id.*; Table 1.

<sup>22</sup> *Id.*; Table 12.

<sup>23</sup> *Id.*; Table 14.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; Table 12.

<sup>26</sup> 2000 census data lists persons responding to the category of “Race” with “Black or African-American alone or in combination” at 12.9% of the U.S. population; that percentage rose to 13.6% in the 2010 census. See <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

<sup>27</sup> Rob Stein, “Study Finds Major Shift in Abortion Demographics,” *Washington Post*, Sep. 23, 2008, available at [http://pqasb.pqarchiver.com/washingtonpost/access/1559584011.html?FMT=ABS&FMTS=ABS:FT&date=Sep+23%2C+2008&author=Rob+Stein+-Washington+Post+Staff+Writer&pub=The+Washington+Post&edition=&startpage=A.3&desc=Study+Finds+Major+Shift+in+Abortion+Demographics+\(by+subscription\)](http://pqasb.pqarchiver.com/washingtonpost/access/1559584011.html?FMT=ABS&FMTS=ABS:FT&date=Sep+23%2C+2008&author=Rob+Stein+-Washington+Post+Staff+Writer&pub=The+Washington+Post&edition=&startpage=A.3&desc=Study+Finds+Major+Shift+in+Abortion+Demographics+(by+subscription)).

more likely to be aborted than white infants.<sup>28</sup> African-American women also obtained the highest percentage of later-term abortions,<sup>29</sup> in which risks to health are greater, and are more likely to suffer from preterm birth,<sup>30</sup> which has been linked to prior abortion of the maternal patient and is associated with a multiplicity of health problems for the neonatal patient.<sup>31</sup>

These are grave statistics for our African-American population. Tragically, the Centers for Disease Control and Prevention (CDC) observes that “abortion provides a proxy measure for the number of pregnancies that are unwanted.”<sup>32</sup>

The CDC notes that multiple factors can influence the incidence of abortion, “including the availability of abortion providers.”<sup>33</sup> In this regard, it is important to note that 80% of all non-primary-care abortion providers are located in major metro U.S. regions, where the population of African-American citizens is more highly concentrated.

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<sup>28</sup> Notably, although the CDC attributes the comparatively high abortion rates and ratios among African-American women to higher unintended pregnancy rates and a higher percentage of unintended pregnancies ending in abortion, Hispanic women have a slightly higher percentage of pregnancies that are unintended but are no more likely than non-Hispanic white women to end unintended pregnancies by abortion. CDC, *supra*; Table 21.

<sup>29</sup> *Id.*; Table 22.

<sup>30</sup> African-American women have three times the risk of early preterm birth, defined as delivery at less than 32.0 weeks’ gestation, and four times the risk of extremely preterm birth, defined as delivery at less than 28.0 weeks’ gestation, compared with non-African-American women. G. Alexander et al., *U.S. Birth Weight/Gestational Age Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics and Blacks*, 111 PEDIATRICS 61 (2003), available at [www.pediatrics.org/cgi/content/full/111/1/e61](http://www.pediatrics.org/cgi/content/full/111/1/e61).

<sup>31</sup> B. Rooney & B.C. Calhoun, *Induced Abortion and Risk of Later Preterm Birth*, 8 J. AM. PHYS. SURG. 6 (2003).

<sup>32</sup> *Id.* “[I]ntended pregnancies are estimated to account for only 4% of all abortions.” *Id.* These data do not appear to be changing over time. Three nationally representative surveys of women obtaining abortions in 1987, 1994-95 and 2001-02 have reported similar demographic results. CDC, *supra*, nn. 7-9.

<sup>33</sup> *Id.*; nn. 11, 68-70.